Nos. 10-929/10-931/10-932

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In The
Supreme Court of the United States

DENNIS DAUGAARD,
GOVERNOR OF SOUTH DAKOTA, *et al.*,
Petitioners,

v.

YANKTON SIOUX TRIBE AND
UNITED STATES OF AMERICA,
Respondents.

SOUTHERN MISSOURI RECYCLING AND
WASTE MANAGEMENT DISTRICT,
Petitioner,

v.

YANKTON SIOUX TRIBE AND
UNITED STATES OF AMERICA,
Respondents.

PAM HEIN, STATE'S ATTORNEY OF
CHARLES MIX COUNTY, SOUTH DAKOTA, *et al.*,
Petitioners,

v.

YANKTON SIOUX TRIBE AND
UNITED STATES OF AMERICA,
Respondents.

On Petitions For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

AMICUS CURIAE BRIEF OF CHARLES MIX ELECTRIC ASSOCIATION, INC. AND ROSEBUD ELECTRIC COOPERATIVE, INC. IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

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Pursuant to Supreme Court Rule 37(2), Charles Mix Electric Association, Inc. of Lake Andes, South Dakota, and Rosebud Electric Cooperative, Inc. of Gregory, South Dakota, hereby respectfully submit this brief as *amici curiae* in support of the Petitions for Writ of Certiorari filed by the State of South Dakota, Charles Mix County, and Southern Missouri Recycling and Waste Management District.

INTEREST OF *AMICI* COOPERATIVES[1]

Charles Mix Electric Association, Inc. ("Charles Mix Electric" herein) and Rosebud Electric Cooperative, Inc., ("Rosebud Electric" herein) are both nonprofit rural electric distribution cooperatives incorporated in 1945 under South Dakota Law. Charles Mix Electric serves rural Charles Mix County. Rosebud Electric serves rural Gregory and Tripp Counties. The original (1858) Yankton Sioux Indian Reservation was located in what is now Charles Mix County, South Dakota. The original (1889) Rosebud Indian Reservation included what is now Gregory, Tripp, Lyman, Mellette and Todd Counties, South Dakota. These diminished reservations share a common history,

[1] The parties were notified ten days prior to the due date of this brief of the intention to file. Written consent of all parties accompanies this brief. No counsel for a party authored any part of this brief. No counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Only the identified *amici curiae* made monetary contributions and funded the preparation and submission of this brief.

especially with regards to treaty and statutory language, Indian allotments, ceded surplus lands, and subsequent white settlement. *See South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998) and *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977).

By South Dakota statute, each of these cooperatives serves an assigned territory. S.D.C.L. § 49-34A-42. Charles Mix Electric's service territory includes approximately 36,500 acres of "Indian country" on the east side of the Missouri River. Rosebud Electric's service territory includes approximately 88,000 acres of "Indian country" on the west side of the Missouri River. The Indian lands served by these two cooperatives are scattered in "checkerboard" fashion throughout their respective service territories. In the past several years the Yankton Sioux Tribe and the Rosebud Sioux Tribe have each sought to exercise regulatory authority over businesses located within the former (1858 and 1889) reservation boundaries. These efforts included business licensure, taxation, rate regulation, imposition of a tribal utility code, and establishment of a tribal utility commission.[2]

The *amici* cooperatives are currently regulated by both state and federal law which prohibit rate

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[2] See Appendices A and B, Title 11 and 20 of the "Law and Order Code of the Rosebud Sioux Tribe". See also Appendix C, May 27, 2009 correspondence to Rosebud Electric Cooperative, Inc., from Rosebud Sioux Tribe Utility Commission Office.

discrimination within the same class of consumers. Under controlling law, the same rates must apply to tribal members and nonmembers regardless of location of service, i.e. fee, tribal, or trust lands. Cooperative law also requires that each class of consumers bears the operating costs and expenses required to furnish service to that class. *Lillethun v. Tri-County Elec. Cooperative, Inc.*, 152 N.W.2d 147 (N.D. 1967). Under the terms of United States Department of Agriculture guaranteed Rural Utility Service ("RUS") loans and federal regulations, distribution cooperatives are required to design and implement rates to provide sufficient revenue to:

(i) pay all fixed and variable expenses;

(ii) provide and maintain reasonable working capital; and

(iii) maintain, on an annual basis, minimum "coverage ratios" (TIER, DSC, OTIER, and ODSC) to ensure "reasonable security for and/or the repayment of loans made or guaranteed by RUS."[3]

See 7 C.F.R. § 1710.114. Failure to meet such requirements may result in default, acceleration of the debt, and operational "take-over" by RUS.[4]

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[3] RUS Standard Loan Contract, Article I, § 5.4.

[4] RUS Standard Loan Contract, Article VII, § 7.1 and Article VIII, § 8.1.

The decision of the Eighth Circuit Court of Appeals in *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994 (8th Cir. 2010), would arguably subject the *amici* rural electric cooperatives to utility regulation (including rate making) by the resident tribes; at least to the extent of the scattered tribal and trust lands. This is so because the Court in *Podhradsky* expressly held that Indian allotments and trust lands within a diminished Indian reservation retain their reservation status and constitute "Indian country" under 18 U.S.C. § 1151(a), and therefore fall under "the primary civil, criminal, and *regulatory* jurisdiction of the federal government and the resident Tribe rather than the states." *Id.* at 1006 (emphasis added).

For these *amici* cooperatives (and those similarly situated), the consequences of tribal regulation would be disastrous because tribal rates, rules, and procedures differ from those governing the other 85% to 90% of the consumers within the same service territory. The cooperatives would invariably find themselves at odds with one authority or another for discriminatory or disparate treatment within the same class of consumers. Although Tribal Utility Codes may defer to federal regulations and RUS loan provisions, there is no assurance that rates established by the Tribal Utility Commissions would be sufficient to meet the minimum standards required by RUS loans and federal regulations. Thus, these non-profit cooperatives could face default and foreclosure.

This intolerable situation is not confined to the *amici* cooperatives. In the past few years, the national trend toward tribal regulation of utilities has grown dramatically. In South Dakota alone, four Tribes have established tribal utility codes, taxes, and commissions.[5] Other Tribes have sought to impose gross revenue, sales, and/or business taxes upon electric distribution cooperatives for the privilege of doing business in diminished reservations.[6] Of the 28 rural electric distribution cooperatives in South Dakota, 14 serve tribal and trust lands within their respective service territories.[7]

The practical effect of the Eighth Circuit Court's holding in the *Podhradsky* case is to create innumerable "mini-reservations" within electric service territories where tribal utility commissions may impose rates and rules without regard to 85% to 90% of the other consumers within the same area and classification. For Charles Mix Electric and Rosebud Electric the situation is unmanageable.

ARGUMENT

I. HISTORICAL SUMMARY

The "tangled history" of the Yankton Sioux Reservation has been set forth in numerous federal and

[5] Crow Creek Sioux Tribe, Oglala Sioux Tribe, Rosebud Sioux Tribe, and Standing Rock Sioux Tribe.

[6] Sisseton-Wahpeton Sioux Tribe and Yankton Sioux Tribe.

[7] See Appendices D and E.

state decisions. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998); *Perrin v. United* States, 232 U.S. 478, 34 S.Ct. 387, 58 L.Ed. 691 (1914); *Yankton Sioux Tribe v. United States Army Corps of Engineers*, 606 F.3d 895 (8th Cir. 2010); *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994 (8th Cir. 2010); *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010 (8th Cir. 1999); *Yankton Sioux Tribe v. Southern Missouri Waste Management District*, 99 F.3d 1439 (8th Cir. 1999); *Weddell v. Meierhenry*, 636 F.2d 211 (8th Cir. 1980), *cert. denied*, 451 U.S. 941, 101 S.Ct. 2024, 68 L.Ed.2d 329 (1981); *Yankton Sioux Tribe v. United States*, 623 F.2d 159 (Ct. Cl. 1980); *Bruguier v. Class*, 1999 S.D. 122, 599 N.W.2d 364; *State v. Greger*, 1997 S.D. 14, 559 N.W.2d 854; *State v. Thompson*, 355 N.W.2d 349 (S.D. 1984); *State v. Winckler*, 260 N.W.2d 356 (S.D. 1977); *State v. Williamson*, 87 S.D. 512, 211 N.W.2d 182 (1973); *Wood v. Jameson*, 81 S.D. 12, 130 N.W.2d 95 (1964); *State ex rel. Hollow Horn Bear v. Jameson*, 77 S.D. 527, 95 N.W.2d 181 (1959).

A brief summary of that history is as follows: The Yankton Sioux Indian Reservation was created by the 1858 Yankton Treaty of Cession. The reservation originally consisted of 430,495 acres in what is now Charles Mix County, South Dakota. With the passage of the General Allotment (Dawes) Act of 1887, the Yankton Sioux Reservation was partitioned into parcels ("allotments") assigned to individual tribal members. In 1892, the Tribe and the United States negotiated a second treaty, which Congress ratified in 1894 (the "1894 Act"). By this agreement and for a

"sum certain" ($600,000), the Tribe "ceded, sold, relinquished, and conveyed" all of its unallotted or "surplus" land (168,000 acres) to the United States. President Cleveland opened the unallotted land for settlement in 1895 and the area filled with white settlers. Tribal government quickly faded and became nonexistent. By 1913, Yankton Sioux tribal members held 70,000 acres. By 1930, tribal members owned only 43,358 acres. Of the 262,000 acres originally allotted, only about 15% remained in Indian hands. At present, total Indian holdings in the region consist of approximately 30,000 acres of allotted land and 6,500 acres of tribal land. Most of these remaining Indian lands are held in trust by the United States government for the benefit of individual tribal members and the Tribe itself. The process of "diminishment" of the Yankton Sioux Reservation is fully documented in both *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 333-40, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998) and *State v. Greger*, 559 N.W.2d 854, 856-59 (S.D. 1997).

II. CONFLICT WITH STATE SUPREME COURT

The holding of the Eighth Circuit Court in *Podhradsky* directly conflicts with the South Dakota Supreme Court's decisions regarding the former Yankton Sioux Reservation. The South Dakota Supreme Court held in *State v. Greger*, 559 N.W.2d 854 (S.D. 1997) that:

> For over one hundred years, federal and state authorities have treated the Yankton Sioux Reservation as diminished. By agreement of tribal members and an Act of Congress, all unalloted reservation lands were sold to the United States and opened for settlement in 1895. The United States Supreme Court in 1914 referred to the very area now in question as no longer part of the reservation, and, in four separate decisions, this Court concluded diminishment occurred. Statutory language, contemporary negotiations, land ownership, population patterns and "jurisdictional history" all support diminishment. After more than a century, no other expectation is reasonable – using the [United States] Supreme Court's "clean analytical structure," the evidence is clear: the Yankton reservation has been diminished.

Id. at 867.

A few years later and mindful of the United States Supreme Court decision in *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998), the South Dakota Supreme Court handed down its decision in *Bruguier v. Class*, 599 N.W.2d 364 (S.D. 1999). There, the State Supreme Court, using the traditional three factor analytical structure, held that the Yankton Sioux Reservation had been *disestablished* by the 1894 Act and that formerly allotted land did not qualify as "Indian

country" under 18 U.S.C. § 1151(a). *Id.* at 371-78. Further, in construing Section 1151 the State Supreme Court stated, " . . . Congress intended subsection (a) to apply to the closed area of reservations, and (c) to apply to allotted lands in open territory." *Id.* at 371; citing *State ex rel. Hollow Horn Bear*, 77 S.D. 527, 95 N.W.2d 181 (1959).

However, the Eighth Circuit Court in *Podhradsky* pointedly disregarded *Greger* and *Bruguier* and ruled that the Yankton Sioux Reservation "was never disestablished" and that allotments are part of the "continuing" Yankton Sioux Reservation and therefore qualify as "Indian country" under 18 U.S.C. § 1151(a). *Podhradsky*, 1010. Going further, the Court held that allotments still held in trust are land within the limits of an Indian reservation under the jurisdiction of the United States Government. *Id.*

Central to the Eighth Circuit Court's analysis was its determination that, "In the absence of any clear congressional intent to divest allotted lands on the Yankton Sioux Reservation of their reservation status, those [allotted] lands retained such status, and all outstanding allotments continue to be reservation under § 1151(a)." *Podhradsky*, 1017. Yet in *Bruguier*, the South Dakota Supreme Court concluded that the Congressional intent behind the language of the 1894 Act was "unmistakable" and that Congress intended to terminate the reservation. *Bruguier*, 377.

The obvious conflict between the South Dakota Supreme Court and the Eighth Circuit Court of Appeals

cannot be reconciled. In *Podhradsky* the federal appellate court dismissively commented that, "*Bruguier's* conclusion that the Yankton Sioux Reservation had been disestablished in 1894 was more sweeping than necessary for resolution of the matter at issue. . . ." *Podhradsky*, at 1005 n. 7. Such a perfunctory dismissal of Justice Konenkamp's careful scholarship in *Greger* and *Bruguier* tends to underscore the need to resolve the persistent conflict between South Dakota's highest court and the Eighth Circuit Court of Appeals.

III. *MONTANA v. U.S.*

The distinction between "1151(a) Indian country" and "1151(c) Indian country" is all important to the *amici* cooperatives because whether the lands in question are "within a reservation" is determinative of tribal civil and regulatory jurisdiction over non-Indian activities. *See Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981); *Strate v. A-1 Contractors*, 520 U.S. 438, 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997); and *Plains Commerce Bank v. Long Family Land and Cattle Company, Inc., et al*, 554 U.S. 316, 128 S.Ct. 2709, 171 L.Ed.2d 457 (2008). It is settled law that tribes generally do not possess authority over non-Indians who come within their borders. *Montana*, 450 U.S. 544, 564-65 (1981); *Strate v. A-1 Contractors*, 520 U.S. 438, 446 (1997). This is so because nonmembers have no part in tribal government and have no say in the laws and regulations that govern tribal territory. *Plains Commerce*

Bank v. Long Family Land and Cattle Co., 554 U.S. 316, 371, 128 S.Ct. 2709, 2724, 171 L.Ed.2d 457, 477 (2008). However, *Montana* provides two exceptions: (1) a tribe may regulate, through taxation, licensing, and other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements; and (2) a tribe may exercise civil authority over the conduct of non-Indians on fee lands within the reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. *Plains Commerce Bank*, 329-30, citing *Montana*, at 565.

Both *Montana* exceptions require that the activities of the nonmember occur on the reservation. *Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087 (8th Cir. 1998). ("The operative phrase is 'on their reservations'.") Neither *Montana* nor its progeny purports to allow Indian Tribes to exercise civil or regulatory jurisdiction over the activities or conduct of non-Indians occurring outside their reservations. *Id.* at 1091. Thus, for the *amici* cooperatives, the critical question is whether the trust allotments in the diminished Yankton Sioux Reservation are "within a reservation" under subsection (a) of 18 U.S.C. § 1151.

IV. "WITHIN A RESERVATION" vs. "RESERVATION STATUS"

The Court in *Podhradsky* departs from the plain meaning of 18 U.S.C. § 1151 in its determination that allotments retain their "reservation status" despite the removal of exterior reservation boundaries. It does so by straying from the literal and logical meaning of the words of the statute in favor of an attenuated theory of residual "reservation status".

18 U.S.C. § 1151 provides:

> [T]he term "Indian country", as used in this chapter, means
>
> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,
>
> (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and
>
> (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 was originally enacted to define federal *criminal* jurisdiction. Only by judicial fiat has

it come to have implications for tribal taxation and civil/regulatory jurisdiction. *Alaska v. Native Village of Venetie Tribal Government,* 522 U.S. 520, 527, 118 S.Ct. 948, 140 L.Ed.2d 30 (1998) citing *DeCoteau v. District County Court for Tenth Judicial District,* 420 U.S. 425, 427, n. 2 (1975). In analyzing 18 U.S.C. § 1151, the South Dakota Supreme Court in *Bruguier v. Class,* 1999 S.D. 122, 599 N.W.2d 364, interpreted the statute to mean that subsection (a) encompassed those areas *within a reservation,* and that subsection (c) applies to those lands standing *outside the reservation boundaries*. *Bruguier*, 371. This common sense interpretation was made with due regard for and careful consideration of the United States Supreme Court's decision in *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998). *See Bruguier v. Class*, 599 N.W.2d 364, 365 (S.D. 1999). For the South Dakota Supreme Court, the term "within the limits of any Indian reservation" meant exactly that – land within the delineated boundaries of a geographically identifiable reservation.

By contrast, the Eighth Circuit Court in *Podhradsky* couched much of its decision in terms of "reservation status". *Podhradsky*, 1008-10. In using "reservation status" rather than "within the limits of any reservation", the Eighth Circuit panel granted itself an interpretive license to disregard the fact that the boundaries of the former Yankton Sioux Reservation have unquestionably been "obliterated". *See, e.g., United States v. Oklahoma Gas & Electric Co.*, 318 U.S. 206,

63 S.Ct. 534, 87 L.Ed. 716 (1943). The Court of Appeals justified its departure from the plain meaning of 18 U.S.C. § 1151(a) by referencing *Solem v. Bartlett*, 465 U.S. 463, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984), wherein the Court stated that, "Once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise". *Solem*, at 470, citing *United States v. Celestine*, 215 U.S. 278, 285, 30 S.Ct. 93, 54 L.Ed. 195 (1909). The defect in the *Podhradsky* Court's "reservation status" analysis is that in *Solem* the Supreme Court was not dealing with a *diminished* reservation. As the Court expressly found in *Solem*, "The Act of May 29, 1908, read as a whole, does not present an explicit expression of congressional intent to diminish the Cheyenne River Sioux Reservation." *Solem,* 465 U.S. 463, 476. The Court in *Podhradsky* carelessly borrowed the term "reservation status" from a case factually distinguishable from the instant case.

Moreover, the Eighth Circuit Court engaged in considerable legal wrenching to fit the "square peg" of trust allotments in the "round hole" of section 1151(a). It began with the correct assertion that allotted trust lands were "Indian country" under § 1151(c). From there, however, the Court in *Podhradsky* set a strident course to scale the "almost insurmountable presumption of diminishment" arising from the statutory language and historical context of the 1892 Agreement and 1894 Act.

Instead of giving due weight to the overwhelming evidence of diminishment, the Eighth Circuit Court turned a blind eye to such evidence and pursued its philosophically preferred conclusion that a continuing reservation existed. In particular, the Court in *Podhradsky* found that:

(A) "The simple act of dividing the reservation was insufficient to divest the allotted lands of reservation status". *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994, 1008 (8th Cir. 2010).

(B) "The Tribe's willingness to cede to the United States its unallotted land does not indicate that the reservation status of allotted lands was also revoked." *Id.*

(C) "We have repeatedly stated that not every surplus land Act diminished the affected reservation." *Id.*

(D) "Simply stated, there is nothing in the historical and documentary record to indicate a congressional intent to terminate the reservation status of the allotted lands immediately upon ratification of the 1894 Act or the opening of the ceded territory to white settlement." *Id.* at 1009.

(E) "In the absence of such an intention, we must conclude that at the time of the [1894] Act those [allotted] lands retained the same reservation status they had enjoyed since the original 1858 Treaty." *Id.*

However, those findings ignored one simple fact: the reservation boundaries were removed under the plain language of the 1892 Agreement and 1894 Act. As pointed out by Justice Konenkamp in *Bruguier v. Class,* 1999 S.D. 122, 599 N.W.2d 364, "[T]he boundaries created by the 1858 Treaty no longer exist because no provision was made in the 1894 Act to delineate *any* boundary. . . ." *Id.* at 371 (emphasis added). The United States Supreme Court has repeatedly emphasized that there is a significant geographical component to tribal sovereignty. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151, 100 S.Ct. 2578, 2587-88, 65 L.Ed.2d 665 (1980). That geographical component has generally been ignored in *Podhradsky.*

In *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998), the United States Supreme Court determined that:

> Article I of the 1894 Act provides that the Tribe will "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unalloted lands within the limits of the reservation"; pursuant to Article II, the United States pledges a fixed payment of $600,000 in return. This "cession" and "sum certain" language is "precisely suited" to terminating reservation status. See *DeCoteau, 420 U.S., at 445.* Indeed, we have held that when a surplus land Act contains both explicit language of cession, evidencing "the present and total surrender of all tribal interests," and a

provision for a fixed-sum payment, representing "an unconditional commitment from Congress to compensate the Indian tribe for its opened land," a "nearly conclusive," or "almost insurmountable," presumption of diminishment arises. *Solem, supra, at 470*; see also *Hagen, supra, at 411.*

The terms of the 1894 Act parallel the language that this Court found terminated the Lake Traverse Indian Reservation in *DeCoteau, supra, at 445*, and, as in *DeCoteau*, the 1894 Act ratified a negotiated agreement supported by a majority of the Tribe. Moreover, the Act we construe here more clearly indicates diminishment than did the surplus land Act at issue in *Hagen*, which we concluded diminished reservation lands even though it provided only that "all the unallotted lands within said reservation shall be restored to the public domain." See *510 U.S., at 412.*

The 1894 Act is also readily distinguishable from surplus land Acts that the Court has interpreted as maintaining reservation boundaries. In both *Seymour v. Superintendent of Wash. State Penitentiary, 368 U.S. 351, 355 (1962)*, and *Mattz v. Arnett, 412 U.S. 481, 501-502 (1973)*, we held that Acts declaring surplus land "subject to settlement, entry, and purchase," without more, did not evince congressional intent to diminish the reservations. Likewise, in *Solem*, we did not read a phrase authorizing the Secretary of the Interior to "sell and dispose" of surplus

> lands belonging to the Cheyenne River Sioux as language of cession. See *465 U.S., at 472*. In contrast, the 1894 Act at issue here – a negotiated agreement providing for the total surrender of tribal claims in exchange for a fixed payment – bears the hallmarks of congressional intent to diminish a reservation.

Id. at 344-45.

At most, the United States Supreme Court envisioned a severely diminished reservation; although it stopped short of deciding whether the reservation was fully "disestablished". ("We need not determine whether Congress disestablished the reservation altogether in order to resolve this case, and accordingly decline to do so." *Id.* at 358.) Nonetheless, such judicial restraint should not be mistaken for a license to create reservation boundaries where Congress specifically removed them a century ago.

Despite the Eighth Circuit Court's reliance on "reservation status" in *Podhradsky*, scant authority exists to support the theory that § 1151(a) applies where no reservation boundaries exist. Rather, the controlling case law consistently holds that Indian allotments outside reservation boundaries derive their "Indian country" status from their allotment character, not from residual "reservation status". *United States v. Stands*, 105 F.3d 1565, 1571-72 (8th Cir. 1997); *United States v. Pelican*, 232 U.S. 442, 449, 34 S.Ct. 396, 58 L.Ed. 676 (1914). For § 1151(a) to apply, there must be identifiable reservation boundaries. *See*

United States v. Celestine, 215 U.S. 278, 285-86, 30 S.Ct. 93, 54 L.Ed. 195 (1909); *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 357-58, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962); *Mattz v. Arnett*, 412 U.S. 481, 506, 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973); *Solem v. Bartlett*, 465 U.S. 463, 467, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984). Thus, the Eighth Circuit Court's "reservation status" approach is inapposite here where the boundaries have been removed by treaty and statute.

The Court's theory of "reservation status" without reservation boundaries, then, is akin to asserting that a shadow remains after the object casting the shadow has been removed. Justice Konenkamp of the South Dakota Supreme Court offers a less ethereal jurisdictional theory for 18 U.S.C. § 1151:

> If subsection (a) is to receive a literal interpretation, a patent to allotted lands within the limits of such a reservation which operated to extinguish the Indian title could not remove such a tract from Indian country, but under subsection (c) such a patent would so operate. Hence, it seems logical to believe that the Congress intended subsection (a) to apply to the closed area of reservation, and (c) to apply to allotted lands in open territory. *Hollow Horn Bear*, 77 SD at 533, 95 NW2d at 185. If the only Indian country remaining is land the Yankton Tribe acquired long after the 1894 Act, along with remaining Indian owned allotments under § 1151(c), then the

> Yankton Sioux Reservation may be considered congressionally terminated.

Bruguier v. Class, 599 N.W.2d 364, 371 (S.D. 1999).

Essentially, Justice Konenkamp finds there is no § 1151(a) "Indian country" within the former Yankton Sioux Reservation. His approach does no harm to federal and tribal criminal jurisdiction on allotted trust lands and agency property because such lands and property still qualify as "Indian country" under subsections 1151(b) and (c). Yet, the fee owners of former allotments and businesses providing goods and services to current trust lands are not subject to the civil or regulatory authority of the Yankton Sioux Tribe because such lands are not "within a reservation" as required by *Montana*.

In summary, the Eighth Circuit Court in *Podhradsky* contrived a jurisdictional theory which put reservation boundaries around each parcel of allotted trust land in order to render it more "durable" § 1151(a) "Indian country". *Podhradsky*, 1008. However, this theory problematically assigns "reservation status" to allotted lands which have not been "within the limits of any reservation" for more than 100 years. Absent any actual reservation boundaries, the Eighth Circuit Court in *Podhradsky* effectively created "mini-reservations" out of the hundreds of parcels of allotted lands scattered throughout Charles Mix County. By doing so, the Court usurped the sole and exclusive power of Congress to create Indian reservations. *Sioux Tribe of Indians v. United*

States, 316 U.S. 317, 326, 62 S.Ct. 1095, 86 L.Ed. 1501 (1942).

IV. THE AGENCY LAND

As discussed above, the Eighth Circuit Court in *Podhradsky* disregarded much of the United States Supreme Court's structural analysis in *South Dakota v. Yankton Sioux Tribe* in order to rule that the allotted lands retained their "reservation status". Moreover, the Eighth Circuit Court "cherry-picked" those few discrepant sentences within *South Dakota v. Yankton Sioux Tribe* which it felt supported its novel theory of a continuing reservation without boundaries. Specifically, the Eighth Circuit Court spotlighted the Supreme Court's statement that Article VIII of the 1894 Act reserved from sale those surplus lands "as may now be occupied by the United States for agency, schools, and other purposes" and quoted *Solem v. Bartlett*, 465 U.S. 463, 474, stating that "[i]t is difficult to imagine why Congress would have reserved lands for such purposes if it did not anticipate that the opened area would remain part of the reservation." *Podhradsky*, 1005.

However, in *Bruguier v. Class*, Justice Konenkamp specifically addressed the "agency, school, and other purposes" language of Article VIII of the 1894 Act. First, he noted that the land was originally reserved to the United States Government, not the Tribe. *Bruguier*, 599 N.W.2d 373 n. 15 (S.D. 1999). (The Tribe did not acquire the school and agency land until

February 13, 1929, when the Government returned it to the Tribe by Public Law No. 70-729, 45 Stat 1167.) Second, Justice Konenkamp explained:

> In keeping with the Dawes Act's twenty-five year trust period following the allotment process, setting aside government land for school and agency purposes was common, even for a terminated reservation. n. 16. In the 1891 treaty with the Sisseton-Wahpeton Tribes, it was understood that on the Lake Traverse Reservation, the United States would continue to own land for school and agency purposes. *See DeCoteau*, 420 U.S. at 435 n. 16, 95 S.Ct. at 1088 n. 16 ("Government should own the lands upon which the agency and school buildings are located."); *id.* at 438 n. 19, 95 S.Ct. at 1089 n. 19 ("'Indian title'" to lands occupied by the "'agency and missionary society'" will be "'extinguished'" (citation omitted)). Moreover, reserving such "lands for Indian schools, religious missions, and service agencies" did not preclude finding congressional intent to disestablish a part of the Rosebud Reservation. *See Rosebud Sioux Tribe v Kneip*, 430 US 584, 622, 97 S.Ct. 1361, 1381, 51 L.Ed.2d 660 (1977) (Marshall, J., dissenting).

Bruguier v. Class, 599 N.W.2d 364, 374 (S.D. 1999).

Thus, the "agency, school, and other purposes" language of the 1894 Act is not dispositive of whether Congress intended a continuing reservation. Moreover, such equivocal language does not countermand

the historical context, statutory and treaty language, expressed congressional intent, jurisdictional history, subsequent treatment, or contemporary demographics of the area; all of which point to a disestablished reservation.

VI. *BEARDSLEE v. U.S.*

The Eighth Circuit Court has previously interpreted 18 U.S.C. § 1151 subsection (a) and (c) to arrive at a construction of the statute markedly different than the Court's decision in *Podhradsky*. In *Beardslee v. United States*, 387 F.2d 280 (8th Cir. 1967), the defendant, an enrolled member of the Rosebud Sioux Tribe, killed his mother and half-brother on formerly allotted land situated in the town of Mission, South Dakota. Mission is located within the boundaries of the diminished Rosebud Indian Reservation and was therefore considered 1151(a) "Indian country" by the United States. The murder occurred at a house rented by the defendant's mother, but owned in fee by non-Indians. At trial, the defendant challenged jurisdiction on the basis that the site of the crime was formerly allotted land and had lost its "Indian country" status by reason of a 1912 patent to non-Indians. In *Beardslee*, the Eighth Circuit Court squarely addressed the substantive differences between "Indian country" under 18 U.S.C. §§ 1151(a) and 1151(c):

> The definition of clause (a) of § 1151 would seem clearly to include the town of Mission, and the site of the alleged offenses, for it is "within the limits" of the Rosebud

> Reservation "notwithstanding the issuance of" the 1912 patent. The defense, however, pivots its jurisdictional argument on clause (c), which would include, within the definition of Indian country, "all Indian allotments, the Indian titles to which have not been extinguished". It is then urged that, by inference, an Indian title which has been extinguished is outside the definition. We decide this issue against the defense. . . . We regard clause (c) as applying to allotted Indian lands in territory now open and not as something which restricts the plain meaning of clause (a)'s phrase "notwithstanding the issuance of any patent". Although this result tends to produce some checkerboarding in non-reservation land, it is temporary and lasts only until the Indian title is extinguished. The congressional purpose and intent seem to be clear. See *State ex rel. Hollow Horn Bear v. Jameson, supra*, pp.184-185 of 95 N.W.2d.

Beardslee v. United States, 387 F.2d 280, 285-87 (8th Cir. 1967).

Clearly, the *Beardslee* Court understood that § 1151(a)'s phrase "within the limits of any reservation" meant lands located within the geographically identifiable parameters of a reservation, whether fee or allotted land. Likewise, the Court in *Beardslee* recognized that allotted lands outside reservation boundaries fell within the purview of § 1151(c). Thus, the reference in *Beardslee* to allotted lands outside the bounds of a reservation as "*non-reservation land*"

is particularly instructive. If allotted trust land is not within reservation boundaries, it is § 1151(c) "Indian country" and not § 1151(a) "Indian country". Plainly, the *Podhradsky* Court's efforts to contort § 1151(c) allotments into § 1151(a) reservation land contravenes the plain meaning of the statute as well as existing case law.

CONCLUSION

The *amici* rural electric cooperatives are rightfully concerned that the Eighth Circuit Court's decision in *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994 (8th Cir. 2010), has brought them to the brink of a regulatory disaster. Discriminatory utility regulation by differing Tribal Utility Commissions, each with the power to set rates and impose taxes, threatens the ability of these electric distribution cooperatives to provide service and power to its customers, including tribal members and entities. "Checkerboard" utility regulation within diminished Indian reservations not only violates basic principles of cooperative law, but also engenders never-ending litigation in tribal, state, and federal courts. This unmanageable situation is the result of the *Podhradsky* Court's misapprehension of established jurisdictional case law and disregard of the plain meaning of 18 U.S.C § 1151. Moreover, the decision in *Podhradsky* has the practical effect of putting reservation boundaries around innumerable allotments which have not been "within a reservation" for more than 100 years. Compelling reasons

exist for the Supreme Court to grant the Petitions for Writ of Certiorari, to-wit: the holding in *Podhradsky* conflicts with numerous decisions of the State Supreme Court and prior decisions of the Eighth Circuit Court of Appeals and the United States Supreme Court.

Dated this 10th day of February, 2011.

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APPENDIX A

Law and Order Code of the Rosebud Sioux Tribe

Additions to code received: 2004

TITLE ELEVEN – TRIBAL TAX CODE

Chapter 1 – Legislative Findings and Purpose
Chapter 2 – General Provisions
Chapter 3 – Tribal Tax Commission
Chapter 4 – Appeals
Chapter 5 – Enforcement
Chapter 6 – Penalties and Interest
Chapter 7 – Retail Sales and Service Tax
Chapter 8 – Use Tax
Chapter 9 – Cigarette Tax
Chapter 10 – Contractors Excise Tax
Chapter 11 – Land Use Tax
Chapter 12 – Business Licences

CHAPTER 1: LEGISLATIVE FINDINGS AND PURPOSE

Sec. 101 Sovereign Power to Tax – The power to levy taxes and similar exactions is an inherent and essential part of the authority of any government. This power is therefore an aspect of the retained sovereignty of Indian tribes except where it has been limited or withdrawn by federal authority. The Rosebud Sioux Tribe is a sovereign Indian Tribe organized pursuant to the Act of June 18, 1934, 48 Stat. 948, as amended, and governed pursuant to a Constitution and By-Laws ratified on November 23, 1935, and approved by the Commissioner of Indian Affairs on

December 20, 1935, as amended from time to time thereafter. Pursuant to the Constitution and By-Laws, the Rosebud Sioux Tribe. This Code is enacted pursuant to the inherent sovereign tribal powers expressly delegated to the Tribal Council in Article IV, Section 1(h) of the Tribal Constitution, which authorizes the Tribal Council to levy taxes upon members of the tribe and to levy taxes or license fees upon non-members doing business within the Reservation.

Sec. 102 Benefits of Tribal Government – Among the benefits provided by the tribal government to tribal members and to non-members residing or conducting business within the Rosebud Reservation are the following: the provision of governmental services, including sewer and water systems, police and fire protection, and a Tribal Court system of general jurisdiction; the promotion and regulation of economic activities within the Tribe's sovereign jurisdiction; and the protection of Reservation lands and resources.

. . . .

Sec. 713 Tax on Utility Services – There is hereby imposed a tax of 4% upon the gross receipts from sales, furnishing, or service of gas, electricity, and water, including the gross receipts from such sales by any municipal corporation furnishing gas, and electricity, to the public in its proprietary capacity, except as otherwise provided in this Chapter; when sold at retail within the Reservation to consumers or users.

. . . .

APPENDIX B

Law and Order Code of the Rosebud Sioux Tribe

Additions to code received: 2004

TITLE 20 – UTILITIES

Chapter 1 – Legislative Findings, Purpose and Scope
Chapter 2 – General Provisions
Chapter 3 – Tribal Utility Commission
Chapter 4 – Powers and Duties of Commission
Chapter 5 – Duties of Public Utilities
Chapter 6 – Electric Utilities
Chapter 7 – Electric Utility Rates and Tariffs
Chapter 8 – *Telecommunications Companies (Reserved)*
Chapter 9 – Pipeline Utilities (Reserved)
Chapter 10 – Gas Utilities (Reserved)
Chapter 11 – Water Companies (Reserved)
Chapter 12 – Heating Utilities (Reserved)
Chapter 13 – Other Public Utilities (Reserved)
Chapter 14 – Procedure on Regulation
Chapter 15 – Civil Infractions

CHAPTER ONE

LEGISLATIVE FINDINGS, PURPOSE AND SCOPE

§20-1-101. Legislative Findings.

(1) **Sovereign Power to Regulate Utilities.** The power to regulate utilities is an inherent and essential part of the authority of any reservation tribal government. This power is therefore an aspect of the retained sovereignty of the Rosebud Sioux Tribe except

where it has been limited or withdrawn by federal law. The Rosebud Sioux Tribe is a sovereign Indian tribe organized pursuant to the Act of June 18, 1934, 48 Stat. 984, as amended, and governed pursuant to a Constitution and Bylaws ratified on November 23, 1935, and approved by the Secretary of the Interior, Harold L. Ickes, on December 16, 1935, as amended from time to time thereafter.

Pursuant to the Constitution and Bylaws, as amended, the Rosebud Sioux Tribal Council is the governing body of the Rosebud Sioux Tribe. This Title is enacted pursuant to the inherent sovereign tribal powers expressly delegated to the Tribal Council in Article IV, Section 1, Subsections (a), (c), (f), (g), (h), (i), (k), (m), (n), (t) and (u) of the Tribal Constitution, which authorize the Tribal Council to represent the Tribe and to negotiate with federal, state and local governments and with private persons, to purchase and otherwise acquire lands and other property for or on behalf of the Tribe and manage, permit, assign, lease, sell, exchange, encumber or otherwise deal with tribal lands and other property as authorized by law, to prevent the sale, disposition, lease or encumbrance of tribal lands, interests in tribal lands or other tribal assets without the consent of the Tribe, to manage all economic affairs and enterprises of the Tribe, to levy taxes and license fees upon non-members doing business within the Reservation, to regulate and license all business and professional activities

conducted upon the Reservation, to exclude by ordinance from the restricted lands of the Reservation persons not legally entitled to reside therein, to enact ordinances providing for the maintenance of law and order and the administration of justice by establishing a tribal court system, to safeguard and promote the peace, safety, morals, and general welfare of the Tribe by regulating the conduct of trade and the use and disposition of property on the Reservation, to charter subordinate organizations for economic purposes, to enact resolution regulating the procedures of all the Tribal Council, all tribal agencies and tribal officials, to administer any funds within the control of the Tribe, and to delegate to subordinate boards or tribal officials any or all of the foregoing powers, subject to review by the Tribal Council.

(2) **Need For Adequate Utility Regulations.** As both the Indian and non-Indian populations within the boundaries of the Reservation increase, and as additional residential, commercial, governmental and agricultural activities multiply, the need for adequate utility regulations grows ever more serious. Inasmuch as the Reservation is checkerboarded with both trust land and nontrust land, and inasmuch as both trust land and nontrust land are crisscrossed by utility lines, pipelines, rail lines and rights-of-way of both investor-owned and nonprofit utilities, adequate protection of utilities, the Tribe, tribal members and nonmembers

requires that the Tribe regulate all utilities operating within the Reservation.

(3) **Demonstrably Serious Impact of Utility Activities Upon the Economic Security, Health and Welfare of the Tribe and Tribal Members.** The rural nature of the Reservation, the fact that many homes of tribal members, especially HUD financed homes, are "all electric," that is, heated solely by electricity, the lack of any other practical heat source for many tribal members and nonmembers, the fact that the health and very lives of many tribal members and nonmembers are dependent upon an assured flow of electricity during the harsh, subzero winter months, the lack of practical transportation of many elderly tribal members and nonmembers during the harsh, subzero winter months, the fact that tribal economic enterprises furnish the majority of jobs for both tribal members and nonmembers on the Reservation, the high cost of electricity within the Reservation, the urgency of minimizing the cost of electricity to the Tribe, tribal members and nonmembers and to economic enterprises owned by the Tribe and tribal members, all evidence the demonstrably serious impact of utility activities upon the economic security, health and welfare of the Tribe and tribal members.

(4) **Lack of State Jurisdiction.** The State of South Dakota lacks jurisdiction to regulate utilities within the Reservation for the

reason that state regulation of such utilities interferes with the right of the Tribe and tribal members to make their own laws and be ruled by them and for the additional reason that utility regulation is preempted by the Tribe and the federal government with respect to all HUD homes of tribal members, other homes and businesses of tribal members financed in whole or in part by the Tribe or the federal government, all tribal buildings and businesses of the Tribe financed in whole or in part by the Tribe or the federal government and all Bureau of Indian Affairs or other federally owned or operated buildings.

(5) **Unconstitutionality of State Utility Regulation Within the Reservation.** As applied, the statutes of the State of South Dakota purporting to regulate utilities operating within the Reservation and purporting to grant jurisdiction to the State Public Service Commission regulating utilities within the Reservation unconstitutionally deny utilities, the Tribe, tribal members and non-members equal protection under both state and federal law because they (a) exempt from regulation of the State Public Service Commission the rates, contracts, sufficiency of facilities, or rules and regulations, [of] any rural electric cooperative corporation or association or any utility owned and operated by the State or by any city, county, township or other political subdivision of the State, (b) assign service areas to each utility, including rural electric cooperative corporations or

associations, within which such utility is granted the exclusive right to provide service at retail price at each and every location at which it was servicing a customer as of March 21, 1975 and to every present and future customer within such area, (c) prohibit any utility, including rural electric cooperative corporations or associations, from providing service at retail price within the assigned service area of another utility unless such other utility consents in writing, but (d) do not grant similar rights, protections or exemptions to any utility owned and operated by any federally recognized Indian tribe or political subdivision thereof within the limits of its reservation.

(6) **Failure of State Law to Regulate Utilities Not Operated for Profit Within the Reservation.** Statutes of the State of South Dakota purporting to regulate utilities operating within the Reservation and purporting to grant jurisdiction to the State Public Service Commission are altogether inadequate in protecting either the Tribe, tribal members, nonmembers or any such utility because such statutes exempt from state regulation the rates, contracts, or sufficiency of facilities, or rules and regulations of any utility that is not operated for profit, and yet purport to authorize the State Public Service Commission to prevent extension of service to the Tribe, a tribal member or a tribal member's business on trust land, or to a tribal business on trust land, by any utility that is operated for profit or any rural

electric cooperative corporation or association that is not specifically assigned the specific portion of the Reservation in question as its exclusive service area. Such extension of service may be denied regardless of whether such service economically benefits the Tribe or tribal member or whether extension of such service will provide the Tribe or tribal member a more secure source of service. Such application of state law results in almost no state legal controls over whether any rural electric cooperative corporation or association operating within the Reservation charges excessive amounts for utility service, or discriminates against the Tribe or tribal members and nonmembers, and unconstitutionally deprives the Tribe, tribal members and nonmembers from choosing utility service from whichever utility is most economically beneficial and provides the most secure source of service.

(7) **Illegal Collection of State Taxes By Utilities.** Despite the fact that both tribal members and the Tribe are immune from state taxes for all utility services provided them within the Reservation, utilities operating within the Reservation have for many years illegally collected the state gross receipts tax and other state taxes upon utilities with respect to services provided to both tribal members and the Tribe within the Reservation. Such illegal collection of state tax cannot be expected to stop unless tribal regulation of such utilities prohibits it as a matter of tribal law.

(8) **Consensual Relations Between Utilities Operating Within the Reservation and the Tribe, Tribal Members and Nonmembers.** The Council finds that every utility which enters and operates within the Reservation, enters into consensual relations, commercial dealings and contracts with residents of the Reservation, Indian and non-Indian, and with the Tribe, to provide services, operate facilities, construct and erect pipelines, transmission lines, poles, towers and other improvements upon and across Reservation lands owned by Indians, non-Indians and the Tribe. The Council further finds that the services, rates, policies, procedures and practices of every utility located and operating upon the Reservation have a demonstrably serious impact which imperils the economic security, health, welfare and general well-being of the Tribe, its members, and all residents of the Reservation and that regulation of every such utility by the Tribe is a necessary and proper exercise of the sovereign authority of the Tribe. The Council further finds that regulation of such utilities located, operating or providing services upon the Reservation is an essential governmental function of the Tribe and that regulation of every such utility located, operating or providing services upon the Reservation by the State of South Dakota or any municipality or political subdivision of the State is an infringement upon the right of the Tribe to make its own laws and be governed by them and demonstrably imperils

the political integrity and right of self-government of the Tribe.

(9) **Utilities Have Easements Across Tribal Land.**

§20-1-102. Purpose.

The Council hereby declares it to be in the public interest that all utilities located, operating or providing services within the Reservation be regulated as hereinafter provided in order to provide all retail consumers of utility services and commodities within the Reservation with adequate and reliable services at reasonable rates, consistent with the financial and economic requirements of such utilities and their need to construct facilities to provide such services and commodities or otherwise to obtain utility supplies, to avoid unnecessary duplication of facilities which increase the costs of service to the consumer and to minimize disputes between utilities which may result in inconvenience or diminished efficiency in service to such consumers. The purpose of this legislation shall also be to regulate all utility policies located, operating or providing services within the Reservation with respect to matters other than rates, including connection of service, disconnection of service, reconnection, deposit and overdue payment charges and to prohibit discriminatory or unreasonable preferences or advantages to any consumer or group of consumers by providers of utility services.

The regulation of utilities within the Reservation by the Tribe pursuant to this Title shall be deemed exclusive and shall preempt all other regulatory authority with respect to all utilities located, operating or providing services within the Reservation.

§20-1-103. Benefits of Tribal Government.

Among the benefits provided by the tribal government to all utilities located, operating or providing services within the Reservation are the following:

(1) The provision of governmental services, including sewer and water systems, police and fire protection, and a Tribal Court system of general jurisdiction;

(2) The promotion and regulation of economic activities within the Tribe's sovereign jurisdiction; and

(3) the orderly development and protection of the Reservation lands, resources and communities.

§20-1-104. Territory, Persons and Property Affected.

To the extent not prohibited by federal law, this Title shall apply to the following:

(1) The Rosebud Sioux Reservation within the historical boundaries of the Reservation established in Section Two of the Act of March 2, 1889, 25 Stat. 888, including all

lands, islands, waters, roads, and bridges, or any interests therein, whether in trust or non-trust status and notwithstanding the issuance of any patent or right-of-way, and such other lands, islands, waters or any interest therein thereafter added to the Reservation;

(2) All trust or restricted land of the Tribe or any enrolled member of the Tribe situate[d] within the historical boundaries of the Reservation established in Section Two of the Act of March 2, 1889, 25 Stat. 888, including all lands, islands, waters, roads, or any interests therein, including Tripp, Mellette, Gregory and Lyman Counties; and

(3) All persons and property within any geographical area referred to in Subsections (1) and (2) that are subject to the jurisdiction and governmental power of the Tribe.

(4) Final adjudication by a court of competent jurisdiction that this Title does not apply to land, persons or property in specific circumstances shall not affect its application to land, persons or property in any other circumstances.

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POWERS AND DUTIES OF COMMISSION

§204-101. Jurisdiction and Powers of Commission.

(1) **General Jurisdiction of the Commission Over Utilities.** The general jurisdiction of the Commission shall extend to and include:

(a) Telecommunications companies engaged in the furnishing of telecommunications services, including telegraph and telephone companies engaged in the transmission of messages or conversations by voice or electronic means;

(b) Pipeline utilities engaged in the transportation of gas, oil, coal, and water;

(c) Electric utilities engaged in the generation and distribution of light or power;

(d) Gas utilities engaged in the distribution of natural, synthetic or artificial gas;

(e) Water companies for the storage and distribution of water for domestic or other beneficial use;

(f) Heating utilities engaged in the distribution of heat; and

(g) All other utilities that operate, maintain or control any equipment or facilities within the Reservation.

Nothing in this Title shall prohibit the Commission from making any order affecting rates, contracts, services rendered, adequacy or sufficiency of facilities, of any utility owned and operated by any state or by any political subdivision of any state or any utility that is not operated for profit.

(2) **Powers of Commission With Reference to Utilities.** The Commission shall have power to:

(a) Investigate all methods and practices of utilities or other persons subject to the provisions of this Title.

(b) Require utilities or other persons to conform to the laws of the Tribe and to all rules, regulations, and orders of the Commission not contrary to law.

(c) Require copies of reports, rates, classifications, schedules, and time tables in effect and used by such utilities or other persons and all other information desired by the Commission relating to such investigations and requirements to be filed with the Commission.

(d) Compel obedience to its lawful orders by proceedings of mandamus

or injunction or other proper proceedings, in the name of the Tribe, in any court having jurisdiction of the parties or of the subject matter, including the Tribal Court.

(e) Hold hearings on good cause shown or on its motion, and to provide notice thereof prior to hearing. Such notice shall he reasonable in view of the nature, scope, and importance of the hearing. Whenever it shall appear to the satisfaction of the Commission that all of the interested parties have agreed concerning the matter at hand, the Commission may issue its order without a hearing.

(f) Require, in its discretion, proof that no unreasonable profit is made in the sale of materials to or services applied for any utility by any firm or corporation owned or controlled directly or indirectly by the utility or any affiliate, subsidiary, parent, associate or any corporation whose controlling stockholders are also controlling stockholders of the utility, before permitting the value of such materials or services to be included in valuations or cost of operations for rate-making purposes. If unreasonable profits have been made in any such transactions,

evaluations of such materials and services may reduced accordingly.

(g) Employ and fix the compensation of rate experts, engineers, and all other expert help and assistance for rate increase application hearings, investigations, and proceedings relating to utilities, subject to Subsections (2)(h) and (2)(j). The expense of any hearings, investigations, and proceedings, and the compensation and actual expenses of any employees of the Commission while engaged in any such hearing, investigation, or proceeding shall, upon appropriate order of the Commission, be paid by the utility being investigated or involved in such hearing or proceeding. A utility liable for such costs and expenditures shall receive appropriate notice and opportunity to demand a hearing before the Commission.

(h) Retain and use the services of only the tribal attorneys or other attorneys designated by the Council upon a contract approved by the Council and the Secretary of the Interior.

(i) Employ and use the services of only the tribal accountants or other accountants designated by the

Council upon a contract approved by the Council.

(j) Cooperate with and receive technical and financial assistance from the United States or any state for any purposes relating to federal energy laws that deal with energy conservation, coal conversion, rate reform, and utilities subject to the jurisdiction of the Commission. The Commission shall also have the authority to file any reports, hold hearings, and promulgate regulations for any such purposes.

(k) Promulgate and enforce rules and regulations consistent with this Title.

(l) Employ and consult with such advisors regarding its duties as it may deem necessary.

(m) Require by regulation the filing of any forms or reports necessary for implementation of this Title.

(n) Examine under oath either orally or in writing any agent, officer, or employee of any utility subject to regulation under this Title, or any other witness with respect to any enforcement action authorized by this Title.

(o) Delegate to an individual Commissioner, or to the Director or other members of the Commission staff or Tribal staff, such of its functions as may be necessary to administer this Title efficiently; provided that the Commission may not delegate its powers to promulgate rules and regulations, or to hear or rule upon any complaints filed with the Commission pursuant to this Title.

(p) Adopt by regulation a schedule of fees and charges for services rendered relating to transcripts and the furnishing or certifying of copies of proceedings, files, and records.

(q) Adopt rules and regulations in furtherance of the purposes of this Title pursuant to §20-4-110.

(r) Exercise all other authority delegated to it by law, or as may be reasonably necessary in the implementation of any provisions of this Title.

Except as provided in this Title, the Commission may exercise one or more of the above powers, [in] its discretion, and may, by appropriate rule or regulation, issued after notice and hearing, assume regulatory authority over one or more classes of utilities within the Reservation. Failure to exercise one or more powers delegated under this Title shall not be deemed a waiver or affect

the ability to exercise such powers in the future.

(3) **Duties of Commission.** The Commission is hereby vested with the powers, rights, functions, and jurisdiction to regulate, in accordance with the provisions of this Title, every utility as defined herein. The exercise of such powers, rights, functions, and jurisdiction is prescribed as a duty of the Commission.

(4) **Power of Commission to Establish Rates.** The Commission shall supervise all rates, tariffs, and charges of all utilities located or operating within the Reservation. It shall have the power, after notice and hearing, to originate, establish, modify, adjust, promulgate, and enforce all rates, tariffs, and charges of all utilities. Whenever the Commission, after hearing, shall find any existing rates, tariffs, charges, or schedules unjust, unreasonable, insufficient, unjustly discriminatory, or otherwise in violation of any of the provisions of this Title, the Commission by order shall fix reasonable rates, joint rates, wheeling rates, charges, or schedules to he followed in the future in lieu of those found to be unjust, unreasonable, insufficient, unjustly discriminatory, or otherwise in violation of any provision of law.

(5) **Power of Commission to Regulate Services.** Whenever the Commission shall find, after hearing, that the rules, regulations, practices, equipment, appliances, facilities or

service of any utility or the methods of manufacture, distribution, transmission, storage, or supply employed by it are unjust, unreasonable, unsafe, improper, inadequate or insufficient, the Commission shall determine the just, reasonable, safe, proper, adequate, or sufficient rules, regulations, practices, equipment, appliances, facilities, service or methods to be observed, furnished, constructed, enforced, or employed, and, after hearing, shall fix the same by its order, rule, or regulation. The Commission shall, pursuant to §20-4-110 and after hearing, prescribe rules and regulations for the performance of any service, or the furnishing of any commodity, of a character furnished or supplied by any utility. On demand and tender of rates, such utility shall furnish such commodity and render such service within the time and upon the conditions provided in such rules and regulations.

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§20-5-107. To Disconnect No Service During Cold Weather.

The Commission shall promulgate regulations setting our procedures for and limitations on a utility's disconnection of residential utility customers who are unable to pay for utility service during cold weather. Such regulations shall include the following:

(1) A definition of "cold weather" as being any time the temperature falls below -30 degrees Fahrenheit, including allowance for a wind chill factor.

(2) Coverage of any utility customer, whom the utility knows or has reason to know (i) whose household income is less than 185% of the federal poverty level; (ii) is bedridden or is otherwise suffering the effects of a serious, life-threatening disease, or (iii) for whom the disconnection of utility service would have other serious, life-threatening effects;

(3) A provision that a customer who pays the utility at least 10% of the customer's income or the full amount of the utility bill, whichever is less, in a cold weather month cannot be disconnected during that month; provided that for the purpose of this Subsection, the term "customer's income" means the actual monthly income of the customer except for a customer who is normally employed only on a seasonal basis and whose annual income is over 135% of the federal poverty level, in which case the customer's income shall be the average monthly income

of the customer computed on an annual calendar year basis.

(4) A provision that the 10% figure in Subsection (3) above must be prorated between energy providers proportionate to each provider's share of the customer's total energy costs whenever the customer receives service from more than one provider;

(5) A provision that a customer's household income does not include any amount received for energy assistance;

(6) Verification of income by the local energy assistance provider, unless the customer is automatically eligible as a recipient of any form of public assistance, including energy assistance, that uses income eligibility in an amount at or below the income eligibility in Subsection (2); and

(7) A provision that the customer receive, from the local energy assistance provider or other entity, budget counseling and referral to weatherization, conservation, or other programs likely to reduce the customer's consumption of energy.

§20-5-108. To Be Liable for Improper Action.

If a utility does, causes to be done, or allows any act, matter, or thing prohibited by this Title or if a utility fails to do any act required by this Title, such utility shall be liable to the person affected thereby for all loss, damages, and injury caused thereby or resulting

therefrom. Any person may bring an action in Tribal Court to recover for such loss, damage, or injury. If the finder of fact finds that the act or omission was willful, the Court, in addition to the actual damages, may award punitive damages. No recovery under this Section shall affect in any manner a recovery by the Tribe of any fine or penalty provided for in this Title or the power to punish for contempt.

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§20-7-103. Factors in Establishing Rate Adjustments.

In reaching its decision on any request for change in tariffs, rates, joint rates, wheeling rates, charges, fares, tolls, schedules, or classifications of an electric utility, the Commission may adopt, in whole or in part, those rates approved or allowed by the State Public Service Commission for the same type or classification of service provided to customers outside the boundaries of the Reservation and within the State. The Commission may adopt such state rates on an interim basis pending full investigation and collection and analysis of data relevant to such rates. Nothing in this Section shall be construed to be a consent to jurisdiction of the State, its agencies or political subdivisions, with respect to the regulation of utilities within the boundaries of the Reservation, such jurisdiction residing exclusively with the Tribe and the Tribal Utility Commission pursuant to the provisions of this Title. The interim adoption by the Commission of any tariff, rate, joint rate, wheeling rate, fare, toll, schedule, or classification established by the State Public Service Commission under this Section shall not affect or in any way limit implementation and enforcement by the Commission of any other provision of this Title relating to tribal regulation of electric utilities within the Reservation.

§20-7-104. Non-Interference with Federal Programs.

In establishing rates under this Chapter for any rural electric cooperative or similar entity operating or providing service within the Reservation; the Commission shall take into consideration the obligations of such electric utilities to the federal government, including the Rural Electrification Administration, and the requirements under federal law applicable to such obligations. Any rates established by the Commission with respect to cooperative electric utilities shall be established so as not to interfere with any federal loan requirements or other federal regulations relating to such electric utilities.

§20-7-105. Reasonable Rates.

Every rate made, demanded, or received by any utility; or by any two or more utilities jointly, shall be just and reasonable. Rates shall not be unreasonably preferential, unreasonably prejudicial or discriminatory, but shall be sufficient, equitable and consistent in application to a class of consumers. To the maximum reasonable extent, the Commission shall set rates to encourage energy conservation and renewable energy use. Any data as to reasonableness should be resolved in favor of the consumer.

APPENDIX C

[SEAL] *Rosebud Sioux Tribe* [SEAL]
Utility Commission Office
P.O Box 430
Rosebud Indian Reservation
Rosebud, South Dakota 57570
Phone: 605-747-4097 ◊ Fax: 605-747-4099
Toll free: 877-837-8729 ◊
Email: tuc99@gwtc.net

Bart Birkeland, Manager May 27, 2009
Board of Directors
Rosebud Electric Cooperative, Inc.
PO Box 439
Gregory, South Dakota 57533-0439
Fax 605-835-9649

Mr. Birkeland & Board of Directors,

The Rosebud Sioux Tribe is a sovereign Indian Tribe organized pursuant to the Indian Reorganization Act of June 18, 1934, as amended. Pursuant to the Constitution and By-laws of the Rosebud Sioux Tribe, the Rosebud Sioux Tribal Council is the governing body of the Rosebud Sioux Tribe. Pursuant to the inherent sovereign powers expressly delegated to the Tribal Council in Article IV, Section 1, Subsections (a), (c), (f), (g), (h), (i), (k), (m), (n), and (u) of the Tribal Constitution, the Rosebud Sioux Tribal Council enacted the Rosebud Sioux Tribe Law and Order Code Title 20, to regulate utilities operating within the boundaries of the Rosebud Sioux Tribe Indian Reservation. RST Law and Order Code Title 20 Chapter 2, Section 20-2-101(9), defines "Utility" as any person, corporation, or other legal entity, its

lessee, trustee, and receiver, now or thereafter located, operating within or providing services within the Reservation, or maintaining, or controlling within the Reservation, equipment, or facilities for furnishing at retail price telecommunications services; pipeline utilities engaged in the transportation of gas, oil, coal, and water; electric utilities engaged in the generation and distribution of light, heat, or power; gas utilities engaged in the distribution of natural, synthetic, or artificial gas; water companies for the storage and distribution of water for domestic or other beneficial use; heating utilities engaged in the distribution of heat; and all other utilities which operate, maintain, or control any equipment or facilities within the Reservation.

The Tribe creates and establishes the Tribal Utility Commission pursuant to RST Law and Order Code Title 20 Chapter 3 Section 20-3-101. The general jurisdiction of the Rosebud Sioux Tribe Utilities Commission shall extend and include electric utilities engaged in the generation and distribution of light and power. RST Law and Order Code Title 4 Section 20-4-101(c).

Rosebud Electric is a electric service provider, operating and providing electrical services engaged in the generation and distribution of light, heat or power, within the boundaries of the Rosebud Reservation and therefore meets the definition of "Utility" under RST Law and Order Code Title 20 Chapter 2, Section 20-2-101(9).

20-4-101(4) Power of Commission to Establish Rates. The Commission shall supervise all rates, tariffs, and charges of all utilities located or operating within the Reservation. It shall have the power, after notice and hearing, to originate, establish, modify, adjust, promulgate, and enforce all rates, tariffs, and charges of all utilities. Whenever the Commission, after hearing, shall find any existing rates, tariffs, charges, or schedules unjust, unreasonable, insufficient, unjustly discriminatory, or otherwise in violation of any of the provisions of this Title, the Commission by order shall fix reasonable rates, joint rates, wheeling rates, charges, or schedules to be followed in the future in lieu of those found to be unjust, unreasonable, insufficient, unjustly discriminatory, or otherwise in violation of any provision of law.

20-7-101 Changes in Tariff Rates; Notice to Commission. No change shall be made by any electric utility in any tariffs, rates, joint rates, wheeling rates, charges, fares, tolls, schedules, classifications or service which have been filed and published by any electric utility pursuant to this Title, except after 30 days notice to the Commission. Such notice shall state plainly the changes proposed. The Commission, for good cause shown, may allow changes upon less than the notice herein specified either in particular instances or by a general order applicable to special or peculiar circumstances or conditions.

In an April 23, 2009 letter from the Rosebud Sioux Tribe Utilities Commission office requested

from Rosebud Electric any rate increase information for the past five years. The Commission office as of this date has not received any response.

The Commission office is requesting from Rosebud Electric rate schedule or rate increase information for the past five years to be filed with the Rosebud Sioux Tribe Utilities Commission office, as required by RST Title 20 Utilities Code. Please provide the rate schedule information requested by June 12, 2009.

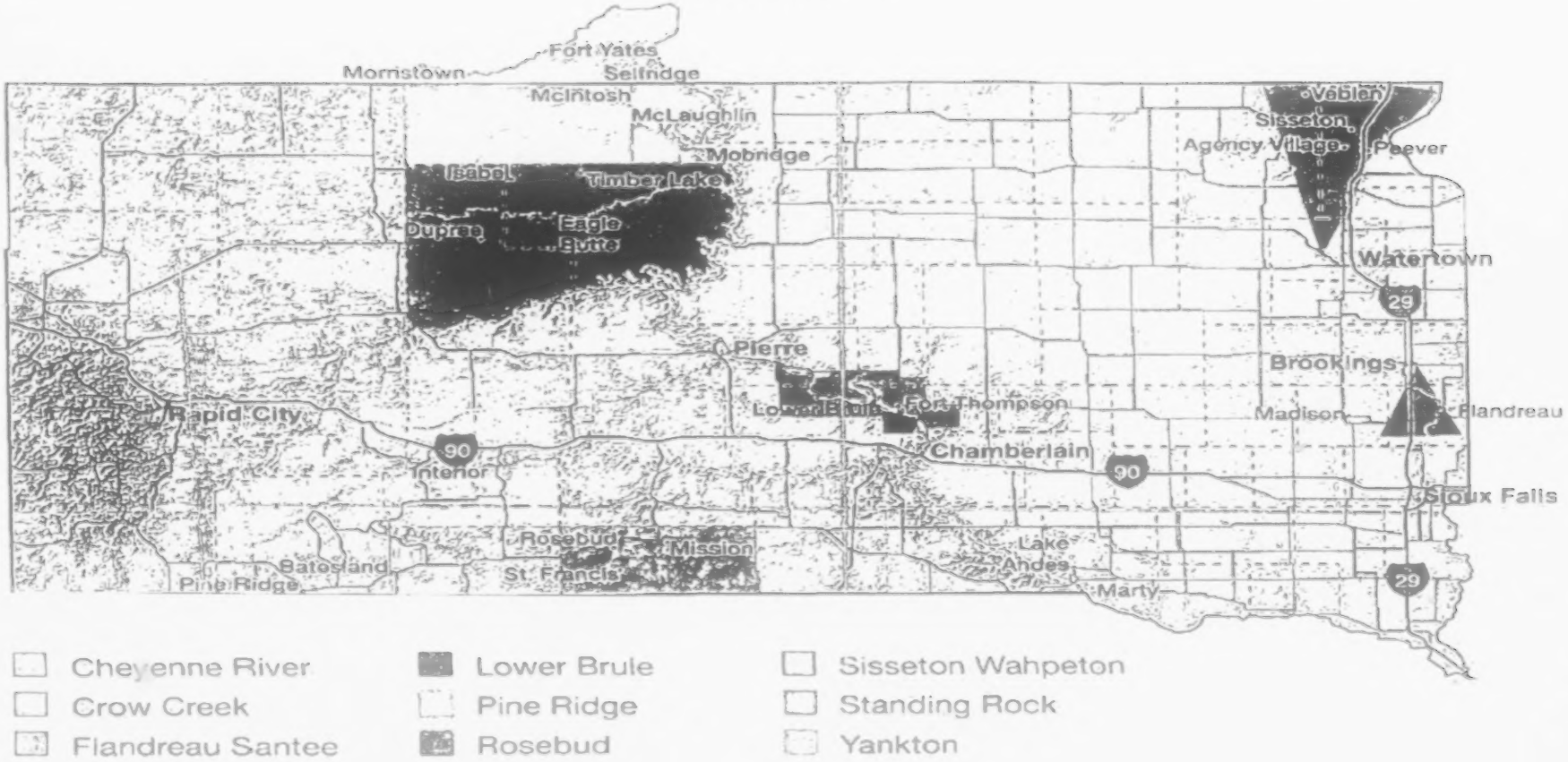
If you have any questions please feel free to call the office.

Sincerely,

/s/ Norman Running, Jr.
Norman Running, Jr.
Executive Secretary
RST Utility Commission

Cc: File

APPENDIX D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Interior
Chamberlain
Rosebud
Mission
St. Francis
Lake Andes
Marty
Batesland
Pine Ridge
Sisseton
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Peever
Watertown
Brookings
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Flandreau
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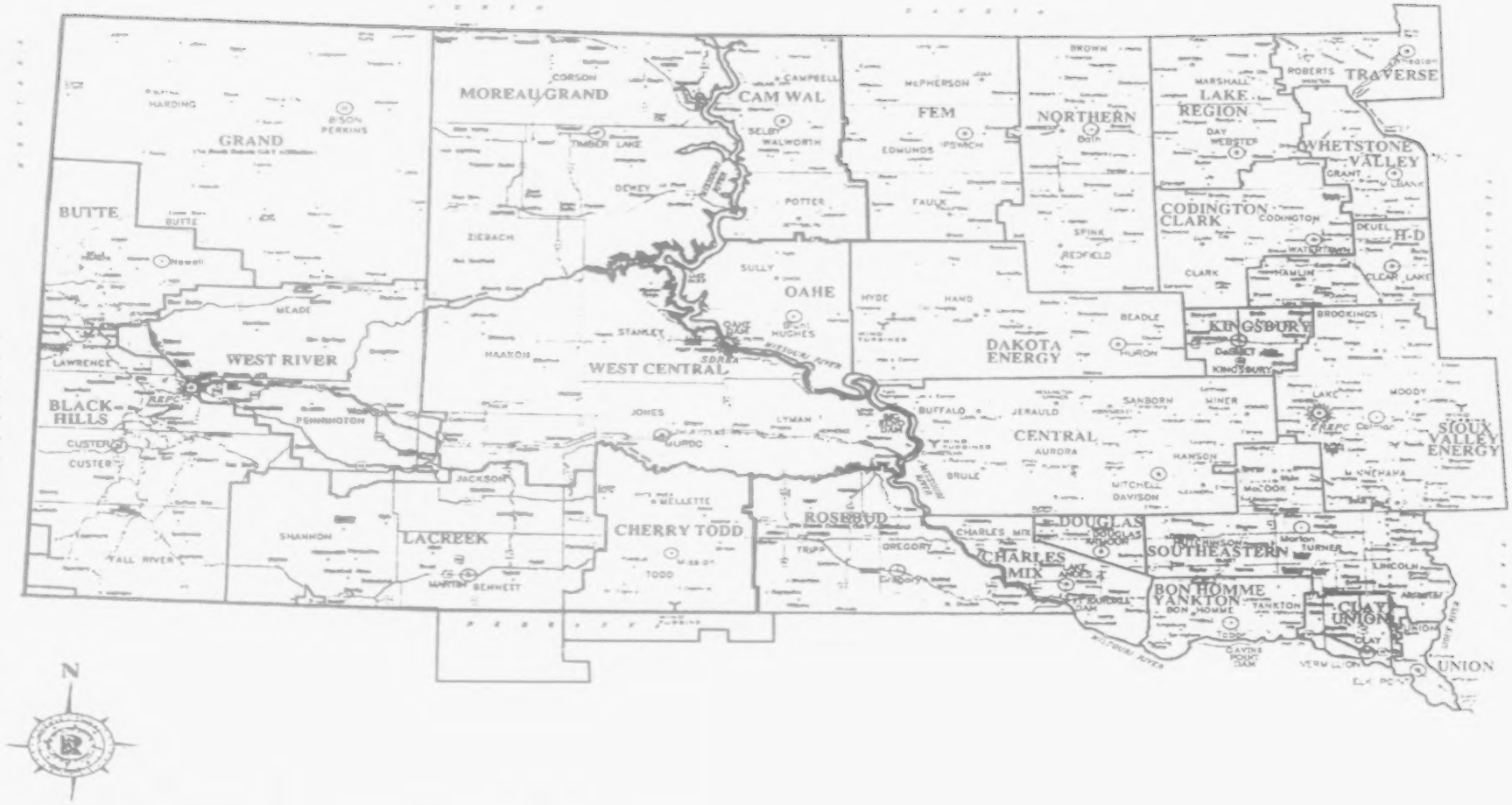
Flandreau Santee
Lower Brule
Pine Ridge
Rosebud
Sisseton Wahpeton
Standing Rock
Yankton

APPENDIX E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FEM
NORTHERN
LAKE REGION
TRAVERSE
WHETSTONE VALLEY
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BUTTE
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H-D
OAHE
KINGSBURY
DAKOTA ENERGY
WEST RIVER
WEST CENTRAL
BLACK-HILLS
CENTRAL
SIOUX VALLEY ENERGY
LACREEK
CHERRY TODD
ROSEBUD
DOUGLAS
SOUTHEASTERN
CHARLES MIX
BON HOMME YANKTON
CLAY UNION
UNION
N